IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAURY I. DIGGS, *Plaintiff in Error,* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 2404.

F. DREW CAMINETTI, *Plaintiff in Error,* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 2405.

MOTION OF PLAINTIFFS IN ERROR FOR A REHEARING.

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Filed this.....*day of April, 1915.*

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

SCHWABACHER-FREY STATIONERY CO., SAN FRANCISCO.

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Upon writs of error to the District Court of the United States for the Northern District of California, First Division.

PETITION FOR REHEARING.

Now come the plaintiffs in error and respectfully petition this Honorable Court for a rehearing herein.

Inasmuch as this Honorable Court disposed of the two cases in a single opinion "for the reason that the points presented to this Court are similar in the two cases," we present, with the permission of the Court, one petition for rehearing instead of filing separate petitions in each case, as the reasons to be urged are substantially the same in both cases.

We submit the following propositions:

1. It has been decided in two appellate jurisdictions that the instructions given by Judge Van Fleet are erroneous. The point has never been definitely settled by the Supreme Court of the United States, notwithstanding the majority opinion of this Court so states. The instructions given violated the constitutional right of the plaintiffs in error.

2. The cases cited do not support the statement of the Court that the Federal Decisions are against the contention of the plaintiffs in error, that the trial court gave to the words "concubine and mistress" too wide and inclusive a meaning.

3. Neither the law nor the evidence support the position of the majority opinion to the effect that neither Marsha Warrington nor Lola Norris could be accomplices of the plaintiffs in error, and that such a holding is in conflict with the case of United States v. Holte, recently decided by the Supreme Court of the United States.

4. Congress cannot, under the commerce clause of the Constitution, enact a criminal statute, the exclusive object of which is the suppression of immoral acts. That power belongs exclusively to the States.

I.

We respectfully urge that the authorities referred to by this Court do not support the doctrine declared that "where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

In this connection, we can do but little more than refer to the dissenting opinion filed in these cases in which the authorities cited in the prevailing opinion are clearly differentiated.

The attention of this Court has already been called to the fact that the Circuit Court of Appeals for the Eighth Circuit, in the case of Balliet vs. United States, 129 Fed. 689, has held that such a doctrine as that announced in the case at bar is erroneous, and the further attention of this Court has been called to a very recent decision of the Circuit Court

of Appeals for the First Circuit, in Myrick vs. United States, 219 Fed. p. 1, in which the majority of that court, Judge Putnam dissenting, followed the rule announced in Balliet vs. United States.

The fact, as stated by us, that none of the authorities referred to by this Court, in the majority opinion, involve or touch upon the doctrine approved by this Court, is confirmed by the majority opinion in the recent case of Myrick vs. United States, 219 Fed. 1, *11,* where the Circuit Court of Appeals for the First Circuit states:

> "This question has never been definitely decided by the Supreme Court. The cases in that court in which the question has been argued have involved the subsidiary question of the right of cross-examination under the federal rule, and have been disposed of either upon the ground that the limit to the right of cross-examination was not exceeded (Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078), or, if exceeded, the answers given were not prejudicial to the respondent (Sawyer v. United States, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269)."

The situation in the case of Myrick v. United States is directly applicable to that involved in the cases at bar. Not only did the trial court permit the prosecuting officer to comment upon the fact that the defendant had not testified as to the whole case, but also instructed the jury that that omission of the

defendant could be taken into consideration in determining his guilt or innocence. We trespass again upon the time and patience of this Court, in support of this application for a rehearing, by quoting at some length from the case of Myrick v. United States. Circuit Judge Bingham, delivering the majority opinion, said:

> "Indictments 110 and 111 were tried together (U. S. Rev. Stat. Secs. 921, 1024); and the defendant Cunningham took the stand and testified in his own behalf, confining his testimony to the source from which he obtained the information contained in the answer to question 12 (d) in the first application—that the commissions paid to agents were 33 1/3 per cent. The District Attorney, in his closing argument to the jury, said:
>
> "There is one thing that happened in this case, gentlemen, which I submit to you, is, on the part of one of the defendants, a confession as to certain of the allegations in these indictments. Mr. Cunningham was not bound to take the stand in his own behalf. The Government could not have called him to the stand and examined him. But he chose to make himself a witness in this case. He had the opportunity offered to him by law, gentlemen, to tell you all the facts within his knowledge, and to deny every allegation which he knew or believed was not true. That was his privilege when he took the stand. He took the stand, charged with three specific wrongful acts. He took the stand, charged with having collaborated with Mr. Myrick, co-operated with him, to make the Post Office Department three false statements, bearing upon a matter of vital interest to the paper whose interests he and Mr. Myrick represented, and the

paper in whose interest their personal interests are very largely concerned. He knew—he is one of the two men in this world, gentlemen, who knows of his own knowledge—whether he conspired, whether he got together with Mr. Myrick or not to violate one of the laws of the United States. Isn't that so? He knows whether there was any understanding, expressed or implied, between them. He knew it when he took the stand. He knew whether, when he wrote that 41,200 and odd as the list of legitimate subscribers—he knew, above all other men in the world, whether that statement was true or false, and whether he knew it was true or false. He knew, as no other man in the world does know, and could tell you, whether, when he wrote the figure '6' in reply to that question as to the number of subscriptions to the paper that were paid for by others, that was true or not, whether he believed it to be true or not. And yet he was asked as to only one of those things, the least important of them all, and that was as to how he happened to write that untrue statement regarding the commissions paid for subscriptions on the first application. In other words, Cunningham knew the information which you want, and wanted, as to whether or not the statement with regard to the 41,000 was true or false; he knew whether that was written in there in accordance with Mr. Myrick's instructions a few days before, when the telegram was received; he knew whether he knew it to be false or not; he knew that he was charged with it; and yet he was not asked to tell you, and he did not tell you, that that was true; and he was not asked to tell you that he didn't know that it was not true when he wrote it. And so, too, with the statement in the second application—absolute silence—charged with a violation of the law, taking the stand in his own cause to give you information—not asked whether, when

he said '6' that was true or false, or whether he knew it to be true or false, or whether it was put there because he and Mr. Myrick had put their heads together for the purpose of getting this newspaper admitted to second class rates, and because they knew that the postal authorities had objected to that kind of subscription, but, as it appears, he deliberately wrote down something which they knew was not true. Why, gentlemen, take it in ordinary everyday life, suppose you accuse an employe of yours of an act of dishonesty, of a theft, or of a breach of duty of some kind not amounting to a crime, and you say, 'You did so and so,' or 'I *think* you did so and so,' and he stands before you absolutely silent, not admitting or denying the fact, do you have any hesitancy in believing that it is because he *can't* deny it? Is there any other reasonable explanation of his silence except that? Would you be justified in assuming that he was guilty of the charge that you made against him because of that silence alone? How much more so, in this case, where the knowledge of the truth or the falsity must have been in Cunningham's possession, as to all three of those allegations, and he is confined in his examination, and I am confined in my examination by reason of that fact, to denial of only one of them—as I said, the least important of them all."

At the close of this argument, and before the court entered upon its charge to the jury, and while there was opportunity on the part of the District Attorney to withdraw the comments which he had made with respect to the failure of the defendant Cunningham to testify to certain matters with which he stood charged in the two indictments, counsel for the defendants objected to these comments, and requested the court to deal with them in the course of his charge. The court forthwith, and before delivering his

charge, ruled 'that a defendant in a criminal case could not waive his constitutional protection piecemeal; and that the defendant Cunningham having taken the stand, and testified as to certain facts in one of the indictments, his failure to testify as to independent facts in that indictment, and as to facts in the other indictment, was the subject of legitimate comment to the jury in argument,' and declined to deal with the matter further, except as hereinafter set forth, and the defendants excepted.

In the course of his charge, the court, as to this matter, said:

'As to the defendant Cunningham, a question has come up about his evidence. Well, now, a defendant under our Constitution cannot be compelled to testify against himself. That is one of the most fundamental principles of our system of criminal law, and if he chooses to sit still nobody can criticize him for doing it. That is his right, either to sit still or to come forward and take the stand. But, gentlemen, he can't come forward, so to speak, and take the stand piecemeal. If he waives his constitutional privilege, he steps outside of the circle which the Constitution draws around him, and comes onto the stand here, he then becomes like a party in a civil case, and his failure to testify upon material points is to be considered by you exactly as you would consider the failure of a party in a civil case to give evidence that apparently lay within his knowledge upon material issues. The failure of a party to give, or to produce evidence within his knowledge or control and material to the issue, is always proper to be considered by a jury. A jury may infer from the silence upon the matter that the party considered that the evidence would not help him; but that is not a *necessary* inference. It frequently happens that lawyers inadvertently forget to ask questions,

material questions; and that ought not to count against the party, or the client, of course, if there is an unintentional omission; but an intentional failure on the part of a party to adduce evidence within his knowledge upon the points in issue, by whatever reason it is prompted, is always a very pertinent matter to be considered by a jury.'

To this portion of the charge the defendants likewise excepted.

It is thus seen that upon objection being made to the argument of the District Attorney, at a time when he could have corrected the error, if one had been committed, the court ruled that the argument was proper; 'that, the defendant Cunningham, having taken the stand and testified as to certain facts in one of the indictments, his failure to testify as to independent facts in that indictment, and as to facts in the other indictment, was the subject of legitimate comment to the jury in argument;' and that later on in his charge to the jury he confirmed his previous ruling, when he stated that it was the right of the accused 'either to sit still or come forward and take the stand,' but if he did come forward he could not do so 'and take the stand piecemeal'; that he waived his constitutional privilege if he stepped outside of the circle which the Constitution drew around him by coming upon the stand the same as a party would in a civil case.

It cannot reasonably be said that the objection and exception to the argument and the ruling thereon were not seasonably and properly taken, or that the exception to the charge was not sufficiently specific to appraise the court of the ground of the objection. The record discloses that the court fully understood what the nature of the objection was upon which the defendants relied. This appears from what took place at the close of the argument of the District Attorney when this matter was without doubt fully

discussed, and the definite and explicit ruling of the court was made. The question is therefore presented whether a defendant, when set to the bar for trial before a jury upon two indictments charging different offenses, by taking the stand and limiting his testimony to a particular charge in one of the indictments, waives his constitutional right with reference to the charge contained in the other indictment, so that inferences may be drawn against him from his failure to testify as to any of the matters there charged. It seems to us that to state the question is to answer it; that it was not the intention of Congress, in the enactment of the law authorizing the trial of an accused person for distinct offenses, at the same time, on two or more indictments, to deprive him of his constitutional right not to have inferences drawn against him by reason of his failure to testify upon one indictment, should he see fit to testify to matters charged in the other indictment; and that this is especially true where the indictments are not consolidated by an order of the court, as they were not in this case, but were tried as independent and distinct matters, though before the same jury. Betts v. United States, 132 Fed. 228, 229, 230, 234, 235, 65 C. C. A. 452.

The exception taken to the ruling of the court made in answer to the objection of counsel to the argument of the District Attorney also presents the question whether, the defendant Cunningham having taken the stand and testified to certain facts in the first indictment, his failure to testify as to independent facts in that indictment was the subject of legitimate comment by the District Attorney in his argument.

This question has never been definitely decided by the Supreme Court. The cases in that court in which the question has been argued have involved the subsidiary question of the right of

cross-examination under the federal rule, and have been disposed of either upon the ground that the limit to the right of cross-examination was not exceeded (Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 K. Ed. 1078), or, if exceeded, the answers given were not prejudicial to the respondent (Sawyer v. United States, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269). In Balliet v. United States, 129 Fed. 689, 695, 64 C. C. A. 201, decided in the Eighth Circuit, the defendant excepted to the following statement of the trial judge in his charge to the jury:

'It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, if he has not fully explained, or has not explained matters which are material to the issues in this case, and which are naturally within his knowledge, you may consider that as a circumstance tending to show that the facts, if explained, etc., would bear out the contention of the government, and his failure to explain them or give a truthful explanation is against him.'

And the court, in commenting upon the charge, said:

'We have not been able to conclude that this instruction states a correct rule of law, or that the giving of it was not a material error.'

This instruction, which was held to be erroneous, did not differ materially from the one given in the case under consideration. The court, after discussing the matter at some length, without reaching any definite conclusion, then assumed that, if the defendant, upon taking the stand, waived his right not to have inferences drawn against him for failure to testify as to material matters, nevertheless the instruction in question gave too great latitude to the jury, and

subjected the defendant to too great a burden in that 'it left the jury to determine what matters which had been given in evidence were "material to the issues in the case",' without directions on that point, and gave 'equal liberty to determine what matters were "naturally within his knowledge" and susceptible of explanation.'

Judge Sanborn concurred in the result reached in that case, but, it would seem, upon vitally different grounds. He took the position that the right of cross-examination in the federal court was limited strictly to subjects inquired of in direct examination; that circumstances might arise under which the court, in the exercise of its discretion, might permit the examiner to inquire as to matters which had not been taken up in direct examination; but that this was not cross-examination, and, in doing so, the examiner made the witness his own. He fails, however, to state the conclusion which he intended should be drawn from this view of the matter. But it is evident that he entertained the opinion that, as applied to the case then under consideration, the defendant, by taking the stand, did not waive his constitutional right to be free from unfavorable comment, except as to matters to which his direct testimony particularly related, and that as to other matters he did not waive his privilege, and did not subject himself to unfavorable comment in this respect, if he declined or failed to testify as to them. And this is the view entertained by Judge Cooley. Cooley's Constitutional Limitations (3rd Ed.) p. 317, note. In some jurisdictions, where the right of cross-examination is unlimited, it is held that a defendant, by taking the stand in a criminal case, waives his right not to have unfavorable inferences drawn against him, if he fails to testify to any material matter. State v. Ober, 52 N. H. 459, 13 Ann. Rep. 88; Commonwealth v. Smith, 163 Mass. 411, 431, 40

N. E. 189; People v. Tice, 131 N. Y. 651, 655, 30 N. E. 494, 15 L. R. A. 669; Commonwealth v. Morgan, 107 Mass. 199, 205; Commonwealth v. Nichols, 114 Mass. 285, 19 Am. Rep. 346; State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688; State v. Williams, 72 Me. 531. And in jurisdictions where the right of cross-examination is restricted to matters inquired of in chief, that he does not. People v. McGungill, 41 Cal. 429; People v. Sanders, 114 Cal. 216, 238, 46 Pac. 153; State v. Elmer, 115 Mo. 401, 22 S. W. 369; State v. Lurch, 12 Or. 99, 6 Pac. 408. It would seem that the courts, in reaching these conclusions, have been largely influenced by the rule existing in the different jurisdictions as to cross-examination—that if the right were unlimited the accused, by taking the stand under such circumstances, would waive his privilege—but, if it were limited to subjects inquired of on direct examination, his privilege would be waived only to that extent, as he had no reason to understand that his conduct would impose a greater burden. We understand the rule in the federal courts as to cross-examination to be as stated by Judge Sanborn in the Balliet Case, and are of the opinion that the defendant Cunningham, by taking the stand and testifying as to the commissions paid to agents, did not waive his constitutional right to be free from unfavorable comment on matters to which his testimony did not relate, and as to which he said nothing."

We respectfully submit that the line of demarcation, pointed out by the Circuit Court of Appeals for the First Circuit in the case of Myrick vs. United States, supra, in explaining what otherwise would seem to be an irreconcilable conflict between the decisions in this country upon the question of the right

of a prosecuting attorney to comment and of the trial court to instruct upon the failure of a defendant to explain or deny matters not elicited from him either on direct or cross-examination, is logical and reasonable and explains this apparent conflict of authority. As stated by that court, in some jurisdictions, where the right of cross-examination is unlimited, it is held that a defendant, by taking the stand in a criminal case, waives his right not to have unfavorable inferences drawn against him, if he fails to testify to any material matter, and in other jurisdictions, where the right of cross-examination is restricted to matters inquired of in chief, that he does not; and the Circuit Court of Appeals for the First Circuit points out that in the federal courts the cross-examination is limited to matters inquired of in chief, a rule of evidence as to which there is not the slightest doubt. As stated by Mr. Justice Brewer in United States v. Mullaney, 32 Fed. 370:

> "Of course, cross-examination is, in the Federal courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony."

And the general rule is thus epitomized in 12 CYC., pp. 577, 578, as follows:

> "In those states where the accused is subject to cross-examination only as to those matters

> testified to on his direct examination, the prosecution cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination."

We respectfully submit that the well settled rule, existing in the Federal courts (and in certain of the states), that cross-examination must be limited to the matters elicited upon direct examination, would be abolished if the doctrine announced by this Honorable Court is admitted to be correct. Hundreds upon hundreds of cases—civil as well as criminal—have been reversed by the Federal Appellate tribunals because cross-examination was permitted by the trial court to extend beyond matters covered by the direct examination. It seems to us axiomatic in criminal cases that if a prosecuting attorney is not permitted to cross-examine a defendant upon matters not covered by his direct examination, he certainly should not be permitted to comment upon matters which the the law holds sacred from intrusion, and if the prosecuting attorney has no right to make such comments, the trial court is equally without the right of commenting or instructing the jury with reference to the testimony of a defendant and telling them that:

> "It is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him he would have done so,"

as was done in the cases at bar.

II.

We desire to call attention to the fact that the cases cited, with perhaps one or two exceptions, do not support the view, announced by this Court in the majority opinion, that "the Federal decisions are against these contentions," referring to the contentions advanced, in behalf of the plaintiffs in error, "that the (trial) Court in its instructions gave to the word 'concubine' and 'mistress' too wide and inclusive a meaning, and it is argued that the defendants by transporting the women for the purpose of making them their concubines and mistresses were not guilty of the offense defined in the Act, and that the words 'prostitution or debauchery, or any other immoral practice, do not include concubinage, and that the immorality denounced by the White-Slave Traffic Act is only commercialized vice." (See Opinion of Hon. William B. Gilbert.)

The first case cited by this Court in support of its statement, contained in the majority opinion, that "the Federal decisions are against these contentions," is the case of Hoke v. United States, 227 U. S. 308. That case was one involving commercialized vice. The indictment in the Hoke case charged that the transportation was "for the purpose of prostitution," whereas, in the case at bar, there is no such allegation or pretense.

The next case cited by this Court is that of Athanasaw v. United States, 227 U. S. 326. It affirmatively appears that that also was a case of commercialized vice. The girl in that case was transported for "the purpose of debauchery," as the indictment there alleged. She was to "get all the money I (she) could get out of them," a clear case of commercialized vice.

The next case cited by this Court is that of United States v. Bitty, 208 U. S. 393. That decision did not involve a consideration of the purpose and scope of the "White-slave Traffic Act."

The next case cited by this Court is that of United States v. Flaspoller, 205 Fed. 1006. That decision is by the District Court for the Eastern District of Louisiana and supports the view taken by this Court as to the meaning of the words "any other immoral purpose." It does not appear to us to be a well measured or considered decision.

The next case cited by this Court is that of Johnson v. United States, 215 Fed. 679. That case also supports the views announced by this Court. But it is interesting to note that the dissenting opinion of Mr. Justice Lamar, concurred in by Mr. Justice Day in the case of the United States v. Clara Holte, recently decided by the Supreme Court of the United States, is opposed to the views announced by the Circuit

Court of Appeals for the Seventh Circuit in the case of Johnson v. United States.

In the latter case, the Circuit Court of Appeals for the Seventh Circuit, in holding that the words "other immoral purpose" included "unlawful sexual intercourse regardless of financial considerations," declares:

> "So it becomes apparent that 'commercialized vice' or 'the traffic in women for gain' is not the common ground, that the nexus indicative of the genus is sexual immorality, and that *fornication* and *adultery* are species of that genus." (See 215 Fed. Rep. 679, *683.*)

Mr. Justice Lamar, in dissenting opinion, gives vent to views that are opposed to those declared by the Circuit Court of Appeals in the Johnson case. We quote from the dissenting opinion as follows:

> *"Congress had no power to punish immorality and certainly did not intend by this act of June 25, 1910, (35 Stat. 825) to make fornication or adultery, which was a state misdemeanor, a federal felony punishable by $5,000 fine and five years' imprisonment.* But when it appeared that there was a traffic in women to be used for purposes of prostitution, debauchery and immoral purposes, Congress legislated so as to prohibit their interstate transportation in such vicious business. That there was such traffic in women and girls; that they were 'literally slaves,' 'owned and held as property and chattels,' and that their traffickers made large profits, is set out at length in the Reports of the House and

Senate Committees (61st Congress, 2nd Session) recommending the passage of the bill. So that an argument based on the use of the words 'slave,' 'enslaved,' 'traffic in women,' 'business in women,' 'subject of transportation,' and the like—which otherwise appear to be strained,? is amply justified by the amazing facts which those reports show as to the existence and extent of the business and the profits made by the traffickers in women. The argument based on the use of these words, and what they imply, is further justified by the fact that the statute itself declares (Sec. 8) that it shall be known as the 'White Slave Traffic Act.' In giving itself such a title the statute specifically indicates that, while of right, woman is not an object of merchandise or traffic, yet for gain she has by some been wrongfully made such for purposes of prostitution—and that trade Congress intended to bar from interstate commerce.

"The Act either applies to women who are willingly transported or it does not. If it does not apply to those who willingly go (47 H. R. 61st Cong., 2nd Session, p. 10) then there was no offense by the man who transported her or in the woman who voluntarily went,—and, in that event there was, of course, no conspiracy against the laws of the United States in her agreeing to go. The indictment here, however, assumes that the Act applies not only to those who are induced to go, but also to those who aid the panderer in securing their own transportation. On that assumption, every woman transported for the purposes of the business stands on the same footing and cannot by her consent change her legal status. And if she cannot be directly punished for being transported, she cannot be indirectly punished by calling her assistance in the transportation a conspiracy to violate the laws of the United States. For if she is within the circle of

> the statute's protection she cannot be taken out of that circle by the law of conspiracy and thus be subjected to punishment because she agreed to go.
>
> "The statute does not deal with the offense of *fornication and adultery,* but treats the woman who is transported for use in the business of prostitution as a victim—often a willing victim but nevertheless a victim. It treats her as enslaved and seeks to guard her against herself as well as against her slaver; against the wiles and threats, the compulsion and inducements, of those who treat her as though she was merchandise and a subject of interstate transportation. The woman, whether coerced or induced, whether willingly or unwillingly transported for purposes of prostitution, debauchery and immorality, is regarded as the victim of the trafficker and she cannot therefore be punished for being enslaved nor for consenting and agreeing to be transported by him for purposes of such business. To hold otherwise would make the law of conspiracy a sword with which to punish those whom the Traffic Act was intended to protect."

In view of these expressions of opinion by two members of the Supreme Court of the United States, we invite a reconsideration of the question as to the true purpose and scope of the "White-slave Traffic Act." Of course, the prevailing opinion shows that the Supreme Court considered that case as one of prostitution—one of commercialized vice. The indictment in that case was one

> "for a conspiracy between the present defendant and one Laudenschleger that Laudenschleger should cause the defendant to be transported

> from Illinois to Wisconsin for the purpose of prostitution, contrary to the Act of June 25, 1910, c. 396; 36 Stat. 825."

It is true that the prevailing opinion states:

> "We do not have to consider what would be necessary to constitute the substantive crime under the Act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged."

The Supreme Court, in the prevailing opinion, took the view that the woman may not always be the victim and if her conduct, in submitting to transportation for the unlawful purpose is voluntary—if she goes willingly—she is equally guilty with the person transporting her and may be indicted for a conspiracy to violate the "White-slave Traffic Act." The dissenting opinion takes the view that the woman, transported, whether willing or unwilling to be transported, is always to be regarded as the victim. But these opinions, we respectfully submit, both prevailing and dissenting, make it clear that the Supreme Court of the United States regards the "White-slave Traffic Act" as limited in its purpose, scope and operation to cases of commercialized vice and not to mere cases of fornication or adultery such as are the cases at bar.

III.

It is respectfully submitted that the position taken by the majority opinion in holding that neither Marsha Warrington nor Lola Norris could be accomplices of the plaintiffs in error is not supported by law or by the evidence contained in the transcript of record.

The question as to whether or not they were accomplices was one for the jury to determine under appropriate instructions from the trial court. But the trial court took upon itself to determine that they were not accomplices, a function and question of fact which belonged exclusively to the jury. We feel that this Court, in its majority opinion, has fallen into the same error.

If Marsha Warrington and Lola Norris, or either of them, went voluntarily and willingly with the plaintiffs in error on the foolish and reprehensible trip from Sacramento to Reno they were not victims but were willing accomplices.

This is distinctly recognized in the case of United States v. Clara Holte, a very recent decision in the Supreme Court of the United States. The Supreme Court even went so far, in that case, as to hold that a woman willingly consenting to be transported for the purpose of prostitution, contrary to the Act of June

25, 1910, c. 396, 36 Stat. 825 (the "White-slave Traffic Act") is a co-conspirator with the person furnishing the transportation and can be indicted with such person for a conspiracy to commit an offense against the United States. If the woman willingly consenting to be transported for any of the purposes denounced by the "White-slave Traffic Act" is so culpable as to be capable of being indicted as a co-conspirator, then most certainly she is an accomplice and it was error for the trial court to take that question of fact from the jury and to refuse to instruct the jury with reference to that subject as requested by the attorneys for the plaintiffs in error. As stated by the Supreme Court in the case of United States v. Clara Holte, supra, "if we abandon the illusion that the woman always is the victim," Marsha Warrington and Lola Norris certainly were accomplices of the plaintiffs in error, for they knowingly and voluntarily, and with common intent with the principal offender, united in the commission of an offense.

United States v. Ybanez, 53 Fed. 536, *540.*

It affirmatively appears in evidence that at the time of the trial of these cases both of the girls had been arrested along with the plaintiffs in error by the State authorities for violations of the State laws arising out of the trip from Sacramento to Reno, and that their cases were then pending and that they were out

on bail. Their complicity was such that they had been arrested with the plaintiffs in error for violations of the State laws. They were equally guilty of complicity with the plaintiffs in error in the violations of those provisions of the "White-slave Traffic Act" upon which both of the plaintiffs in error were convicted.

We cannot assent to the doctrine that a witness may be an accomplice as to one thing in a case and not an accomplice as to another. This Honorable Court held:

> "We are of the opinion that as to the counts of the indictments on which the defendants were found guilty neither Marsha Warrington nor Lola Norris was an accomplice, for while there was testimony which, if credited, Marsha Warrington might have been deemed an accomplice of the defendants in persuading, inducing and enticing Lola Norris to go to Reno, under the last two counts of the indictments that question is eliminated from the case by the verdict of the jury in acquitting each of the defendants on those counts."

If Marsha Warrington was an accomplice, or could be deemed an accomplice, as to some one feature of the case, we submit that she was an accomplice as to every other feature of the case.

Under the recent decision of the Supreme Court in United States v. Clara Holte, both were accomplices. At any rate, there was sufficient evidence on the part

of the plaintiffs in error to justify and require the trial court to submit to the jury, as a question of fact, whether or not Marsha Warrington and Lola Norris, or either of them, were accomplices with the plaintiffs in error and if the jury should so determine that the testimony of an accomplice should be received with caution and weighed and scrutinized with great care by the jury, and that the jury should not regard the testimony of an accomplice unless she is confirmed and corroborated in some material parts of her evidence.

IV.

Neither the majority nor minority opinions mentions the most vital point raised in these cases—the point which strikes at the right of the lower Court to entertain them—to hear and determine the charges made—the jurisdiction of the Court below over the subject matter involved.

This question has never before been presented in a simon pure form in any case.

The point was raised in the Johnson case (215 Fed. 683), but Judge Baker treated it lightly and gave it but a very superficial consideration.

In the lottery cases (188 U. S. 321) we find the nearest approach to it; but, as we will show hereafter, that case was decided on another ground. However, the point was so closely approached in that case that it divided the Supreme Court—five to four.

The point contended is this: Can Congress, under the commerce clause of the Constitution, enact a criminal statute the *exclusive* object of which seeks the suppression of immoral acts. In other words, can the commerce clause be stretched by construction to cover immorality when no subject of traffic is involved?

We say, *No!* most emphatically, *No!*

This phase of the question was ignored in the Johnson case—the only case in which it has been raised other than the lottery cases. The Johnson case was a hard case; it is a legal maxim, that: "Hard cases make bad precedents."

But, it will be said, the traffic question *is* involved. The traffic question is *not* involved.

"Traffic" does not mean "transportation." The two words are not synonymous. In reading the act of June 25th, 1910, these words should be given their individual meanings.

Right here, we wish to say that we are in accord with all the Federal decisions construing Congressional jurisdiction under the commerce clause of the Constitution. We are in harmony with the *conclusions* reached in each of these many decisions, except the Flaspoller case upon which we will comment hereafter.

The only criticism we would have this Court understand that we are advancing is the route selected by the Seventh Circuit to arrive at its conclusion in the Johnson case.

Judge Baker, in subdivision 4 of his opinion (215 Fed. 683-4), says:

> "4. Lawful power in Congress to pass an act of this scope is challenged. There was a time

> when it would have been interesting to examine the contention that the word 'commerce' in the commerce clause of the Constitution means only 'traffic in or an exchange of commodities.' But when the ultimate tribunal long ago definitely decided that the term also includes 'navigation and intercourse,' that 'transportation of persons' in and of itself is 'commerce,' and that 'commerce' may not only be 'regulated,' but actually prohibited, in the interest of the general welfare, no room was left for profitable discussion."

The Seventh Circuit failed to see either the fallacy of this holding or the inapplicability of the authority cited.

In this connection we respectfully refer the Court to pages 264-268 and 279-331 of our Opening Brief in the Diggs case herein.

Let us briefly review the cases cited by Judge Baker (215 Fed. 684):

The passenger cases (7 How. 283) decided that a State was without jurisdiction to regulate foreign passenger traffic. The subject matter of the action was *passenger traffic,* the regulation of the person dealing in human beings for a monetary consideration—carrying people from place to place for hire—a species of commerce. The carrying traffic.

The Gloucester ferry case (114 U. S. 196) deals with the same subject. The 9th Syllabus is the key to its subject matter:

> "The transportation of passengers and freight for hire by a steam ferry across the Delaware River from New Jersey to Philadelphia by a corporation of New Jersey is inter-state commerce, which is not subject to exactions by the State of Pennsylvania."

The subject of the Covington case (154 U. S. 204) is discerned in this quotation taken from the first portion of the syllabus:

> "* * * ; and the eighth section declared that 'the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person passing thereon, with their goods, carriages, or animals of every description or kind; * * *"

The Rohrer case (140 U. S. 545) is the Original Package case. The Supreme Court in that case had under consideration the traffic in liquors—a commercial product—and held that the same when delivered in a State was so delivered subject to the State police regulations. This was an interstate regulation of a traffic in a commercial commodity.

The Supreme Court construed the Federal jurisdiction to regulate the commercial interstate pursuit of dealing in iron pipe when such traffic involved private contracts in restraint of trade in the Addyston pipe case (175 U. S. 211).

As we said before, in the lottery cases (188 U. S. 231), we have incidentally involved, but *not* decided,

the question we are here advocating. Those cases were decided on the question of traffic—the dealing in tickets for money. Had the case involved solely the question of the suppression of the evils of the lottery, were such possible, another result would have been reached. In that case (p. 345) Mr. Justice Harlan, who wrote the majority opinion, thus defines "commerce," both in its general meaning and also as applied by him to that case:

> "What is the import of the word 'commerce' as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States?"

Again, on page 353, he says:

> "These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn."

From these extracts alone, it is seen beyond a peradventure of a question that the Federal jurisdiction in the lottery cases was sustained solely upon the

monetary view-point and not upon the immorality phase of the subject matter. A reading of Mr. Justice Fuller's dissenting opinion in the case is instructive.

When we read Mr. Justice McKenna's opinions in the Hoke and Athanasaw cases, we must do so remembering that those were white-slave cases proper. The defendants were found guilty of trafficking in women for gain. The crime of which they were found guilty was the unlawful dealing in women for a monetary consideration. The women were the lottery tickets. By means of the women the defendants expected to make money. They were a species of merchandise. In the Holt case, the woman made her master's money in a house of prostitution. In the Athanasaw case, the woman was to be what is vulgarily known as a "box rustler" in a low variety theatre. Her masters expected to make money out of her sales of liquors to men in a dive. The case being covered by that portion of the statute reading, "or other immoral purpose."

In none of the last three mentioned cases does the regulation of the common carrier feature appear, nor is it an element of the subject matter. Neither the railway company nor the express company is involved in the wrong sought to be punished. In the cases involving the questions purely of transportation of

freight or passengers, the common carrier is the person regulated, not the shipper nor the passenger, as the carrier is, in such cases, the trafficker.

In the instant case, the defendants were not trafficking in these women when they bought the tickets for their passage. They were not making money out of them in so transporting them to Reno. They were not carriers of passengers subject to interstate regulation. They were not engaged in ferrying passengers across the Delaware or exacting tolls for crossing a bridge over the Ohio at Cincinnati. Neither were the women in any sense the subjects of traffic in interstate commerce. They cannot be likened to the packages of liquors—the iron pipe—the lottery tickets—all a specie of trade. They cannot be likened to the women in the Hoke or Athanasaw cases—these defendants were not to use them for the purpose of making money. They were not engaged in any interstate commercial pursuit when they transported them.

When Congress passes a law making it a criminal offense for a common carrier to transport lewd women in inter-state travel, the transporting feature will be lawfully regulated. But until Congress so acts the mere transport feature is not a criminal offense. For instance: Anyone can procure a ticket for a woman whom he knows intends to use it to

travel to another State for the express purpose of engaging in prostitution. Such act would not be indictable under the Mann Act. Why? Simply because there is no commercial feature connected with the act. There is no traffic.

Admitting, for the argument, that every fact in these cases was proven: There is no commercial feature involved. No traffic for a money consideration. No transportation in interstate trade. No question of the regulation of a carrier of passengers nor of a shipper of a commercial subject.

The lottery cases (supra), with the monetary feature of the tickets eliminated, are on all fours. With the traffic for a money consideration thus excluded, can Congress regulate purely immoral conduct?

The Federal jurisdiction in U. S. v. Bitty, 208 U. S. 393, did not fall under the commerce clause, so the case is not in point. (See our Opening Brief in the Diggs case, pp. 308-9.)

U. S. v. Flaspoller, 205 Fed. 1006, is not a well considered case. Judge Foster failed to distinguish the difference between Federal jurisdiction over immigration and Federal jurisdiction granted under the commerce clause. He also failed to note the difference in meaning between "traffic" and "transport."

Upon the other numerous assignments of error, to

which this Court has given its careful consideration, we can do no more than iterate the views expressed by us in our briefs already on file.

We appreciate that the members of this Court have given to these plaintiffs in error most patient, considerate and able consideration of the many vexed and important questions presented, but in view of the fact that the opinion of the Court is not unanimous and that, perhaps, we have not made ourselves as clear as we otherwise should in the advocacy of our various and numerous grounds for a reversal of the judgments of conviction, we respectfully ask this Court to grant a re-hearing herein for the foregoing reasons.

Respectfully submitted,
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United States of America,
Northern District of California.

I, Marshall B. Woodworth, one of the attorneys for the plaintiffs in error hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for the purposes of delay.

MARSHALL B. WOODWORTH,
One of the Attorneys for Plaintiffs in Error.